Supreme Court, U. S.
FILED
MAR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1193

JOE ARANDA, *et al.*,

Petitioners,

vs.

J. B. VAN SICKLE, *et al.*,

Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LEWIS, VARNI AND GHIRARDELLI,
501 South Brand Boulevard,
San Fernando, Calif. 91340,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Respondents' Contention as to Issue Number One 2
Respondents' Contention as to Issue Number Two ... 2
Discussion on Issue Number One 2
Discussion on Issue Number Two 10
Summation on Issue Number One 12
Summation on Issue Number Two 13
Conclusion 13

TABLE OF AUTHORITIES CITED

Cases Page

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 8
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 10, 11
Nevitt v. Sides, 571 F.2d 209 (5th Cir. 1978) 5, 6, 7, 8, 11, 12
Shelly v. Kraemer, 334 U.S. 1 (1948) 8
Washington v. Davis, 426 U.S. 229 (1976) 8
Whitcomb v. Chavis, 403 U.S. 124 (1971) 2, 3, 4, 5, 7
White v. Register, 412 U.S. 755 (1973)..... 2, 3, 4
Wright v. Rockefeller, 376 U.S. 52 (1964) 8, 11
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 2, 4, 7, 10

Rules

Rules of the United States Supreme Court, Rule 19 (28 U.S.C.A.) 10

Statutes

United States Constitution, Fourteenth Amendment 2, 3, 8, 10, 11
United States Constitution, Fifteenth Amendment 1, 2, 10, 11, 13

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1193

JOE ARANDA, *et al.*,

Petitioners,

vs.

J. B. VAN SICKLE, *et al.*,

Respondents.

Respondents' Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents J. B. Van Sickle, et al., respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the Judgment entered in favor of Respondents and against Petitioners in the District Court for the Central District of California and affirmed by the Court of Appeals for the Ninth Circuit.

Petitioners cite the following two issues (reasons) for granting the writ:

(1) The Court of Appeals decision conflicts with a line of equal protection decisions by the Fifth Circuit which define the proper weighing of evidence showing dilution of minority voting strength;

(2) This case presents the important unresolved question of whether the Fifteenth Amendment prohibits practices

which deny or abridge the right to vote of minority persons even if those practices are not shown intentionally discriminatory.

Respondents' Contention as to Issue Number One.

The District Court and Court of Appeals' decision is in compliance with and followed the decisions of this Court, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Register*, 412 U.S.755 (1973) and its Fifth Circuit progeny, including *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

Respondents' Contention as to Issue Number Two.

This issue is not properly before the Court as having not been raised before, but even if it were properly before the Court, the law is clear that a finding of intent is necessary to establish a violation of the Fifteenth Amendment.

Discussion on Issue Number One.

To understand *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), the case Petitioners refer to as the "seminal" case from the Fifth Circuit in this area, it is necessary to discuss two cases from this Court and from whence Zimmer evolved.

The first such case is *Whitcomb v. Chavis*, 403 U.S. 124 (1971) a case in which this Court held that to establish a multimember district unconstitutional under the equal protection clause of the Fourteenth Amendment the challenger had to produce evidence to support findings that the political processes leading to nomination and election were not equally open to the group in question.

The fact that the number of ghetto residents who were legislators was not in proportion to ghetto population did

not prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other residents to participate in the political processes and to elect legislators of their choice.

In reversing the District Court which had found the multimember district scheme unconstitutional this Court took special note of the ability of the minority group to register to vote, to vote, choose the political party they desired to support, participate in the affairs of such party, be equally represented when the party selected its candidates for election and be slated as candidates for office.

This Court also took special note that there was no evidence to suggest that the multimember districts were conceived or operated as purposeful devises to further racial or economic discrimination.

This court reaffirmed *Whitcomb v. Chavis, supra* in *White v. Register*, 412 U.S. 755 (1973). This was a case of consolidated actions attacking multimember district plans in Dallas and Bexar Counties Texas in that the plans diluted the votes of racial minorities. The District Court held the plans involved invidious discrimination against minorities in violation of the equal protection clause of the Fourteenth Amendment. This Court affirmed the District Court.

With due regard for the standards set forth in *Whitcomb v. Chavis, supra*, the District Court, in *White v. Register*, relative to Dallas County, found a history of official racial discrimination in Texas, which at times touched the rights of blacks to register to vote, to vote and to participate in the democratic process. It also referred to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election. The Court also found the utilization of racist campaign tactics in white precincts to defeat candidates who had overwhelming support of the black community.

The District Court concluded that the black community had been effectively excluded from participation in the Democratic Party primary election process and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner.

In Bexar County, Texas, the District Court in *White* found that cultural incompatability conjoined with the poll tax and the most restrictive voter registration procedures in the nation operated to effectively deny Mexican Americans access to the political processes in Texas even longer than blacks who were formerly denied access by the white primary.

In affirming the District Court this Court referred to the special vantage point and the intensely local appraisal the District Court made of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) followed and relied on the *Whitcomb v. Chavis* and *White v. Register* decisions. This case involved an attack on the at large election scheme in East Carroll Parish in Louisiana. The Parish had a population of 13,000 but an area of 450 square miles (note San Fernando population 16,500 but an area of 2.2 square miles).

The Court found that until recently blacks in the Parish, like all blacks in Louisiana, suffered from dual school systems, interposition of an interpretation test which preconditioned qualifications for voting. From 1922-1962 no black member had been permitted to vote.

After citing *Whitcomb v. Chavis* the court stated at page 1305:

> "Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at large districting, or that the existence of past discrimination in general precludes the effective participation in the election system a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provision for at large candidates running from particular geographical sub-districts. The fact of dilution is established upon proof of the existence of an aggregate of these factors."

The Court then found that minority residents of East Carroll Parish had suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process, including a statute of statewide application to attend racially segregated schools, less overt but equally invalid statewide schemes which fostered the maintenance of dual school systems until thwarted in 1960. Until 1965 East Carroll Parish blacks were subject to a state required interpretation test in order to qualify to vote and finally from 1922 to 1962 no black had been permitted to register to vote.

As in Dallas and Bexar Counties in Texas, the electoral devise of a majority voting requirement was operative in East Carroll Parish. This devise has been severally criticized as tending to submerge a political or racial minority.

In *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978) the Court discussed the dilution precedents, at page 216:

> "Rather, in the absence of evidence that the at large provisions themselves were 'conceived or operated as purposeful devises to further racial . . . discrimination' the inquiry becomes one of determining whether the influence of a given racial group has been distorted because its members have been denied equal access to

political processes such as party nominating procedures, registration, and, of course, voting.''

In specifically discussing the dilution precedents of the Fifth Circuit the Court stated at page 224,

> ''That the finder of fact determines the plaintiff had prevailed under one or even several of the Zimmer criteria may not establish the existence of intentional discrimination. (citing cases) The evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. Of course, the plaintiff need not prevail under all of the criteria, Zimmer, 485 F.2d at 1305, nor is he limited to them. The task before the fact finder is to determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case. It comprehends 'a blend of history and an intensely local appraisal of the design and impact of the [at large] district in the light of past present reality, political and otherwise'.''

The fundamental criteria running through these cases is whether there is ''access to the political processes''. The ability to register to vote, to vote, to campaign, to run for office, to participate in political parties, to have input on the selection of candidates who run for office.

For instance in Dallas County, Texas, blacks had been unable to register to vote, had extreme difficulty in being nominated for office because of majority vote requirements, were unable to meaningfully participate in the Democratic party.

In Bexar County, Texas, restrictive voter registration procedures and a poll tax effectively denied Mexican American access to the political process.

In *Zimmer v. McKeithen* blacks had not been permitted to vote until 1962, they were also subject to majority voting requirements and were subjected to a state required interpretation test in order to qualify to vote.

In the recent past they had also been the victims of segregated dual school systems.

In each of these cases the court found exclusion from some significant aspect of the political process either by reason of custom or official state action, and in each case there had recently been *de jure* discrimination.

Contrast the foregoing with the present case.

The Plaintiffs at present and in the past have not been deprived of the right to register to vote, to vote, to be slated for office, to campaign, to organize. There is no majority requirement or single vote prohibition. They readily admit they have not been denied access to the political process. The record clearly demonstrates that they had participated in the political process. True they have not won council seats in proportion to their population but based on *Whitcomb v. Chavis, supra,* this, absent a showing of denial of access to the political process does not constitute a violation of the equal protection clause of the Fourteenth Amendment.

However, the Ninth Circuit did not stop its inquiry in the present case to access only. It also addressed the factors set forth in *Zimmer v. McKeithen, supra.*

The factors listed in *Zimmer v. McKeithen,* and further discussed in *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978), primarily go to the issue of whether the at large scheme was conceived and/or continued with the intent to dilute or discriminate against minorities. Such an intent requirement is

necessary in order to establish a Fourteenth Amendment violation under the equal protection clause. *Washington v. Davis,* 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Wright v. Rockefeller,* 376 U.S. 52 (1964).

Relative to those standards Petitioners contend that the Ninth Circuit dismissed any inferences of minority vote dilution based on past discrimination which had been discontinued. Not so. The Ninth Circuit, as the record reflects, considered the evidence of past discrimination but, as the record reflects, most of it was so remote in time and all of it so spotty that it deserved and received little, if any, weight.

For instance, in support of their claim of past discrimination Petitioners pointed to old newspaper articles portraying Mexican Americans in negative terms. The most recent article was published June 1, 1923.

Petitioners further pointed to restrictive deed covenants declared unconstitutional in 1948 [*Shelly v. Kraemer,* 334 U.S. 1 (1948)], as further evidence of past discrimination affecting present voting patterns.

Petitioners finally point to what they allege were racist campaign tactics utilized by whites in the 1954 and 1972 councilmanic elections. Petitioners complain of the following newspaper article published in 1954 as a racist campaign tactic.

> "For the record . . . on June 8, 1951, Jose Aranda (together with Lee Ward, Sam Richardson, Gilbert Dotson, Robert Martinez and John Anderson) signed the official 'Notice of intention to recall' Herb Martin . . . one of the finest City Councilmen we ever had. For the record . . . Jose Aranda was president of the so called 'Civic Betterment League' which backed Smith, Schofield and Padilla . . . which tried to wreck

> the protection of civil service . . . that published the Bulletin."

The other campaign tactics complained of by Petitioners were during the councilmanic election of 1972 when one of the candidates issued two press releases (pp. 221, 222 of record). These releases need to be read with all the campaign material of this candidate (pp. 223-230 of record). It is submitted they were not racist.

The City of San Fernando was incorporated in 1911 and the foregoing was the only evidence of racist campaign tactics offered.

Petitioners complain that Mexican Americans were subtly discouraged from voting because some of the polling places were in Anglo homes. Again any such evidence offered was spotty and conclusory at best. There was also evidence that polling places were in homes of Mexican Americans and public buildings.

The petitioners further complain that the Courts below gave little weight to evidence that San Fernando's elected officials were allegedly nonresponsive to the needs of Mexican Americans.

The record showed that city officials had been responsive to Mexican Americans in connection with a development project. They had deleted a portion of it from the barrio at the request of the Mexican Americans.

Petitioners further contend that the fact that Mexican Americans are not proportionately represented in higher paying professional jobs in the city is another example of the city's unresponsiveness. However, as was pointed out in the Court's decision, this is readily ascribable to the lower level of education of Mexican Americans in the community. There was nothing in the record to suggest that it was the result of discrimination.

The District Court and the Ninth Circuit did consider factors set forth in *Zimmer*, but found that the evidence offered did not support a finding of impermissible dilution.

Discussion on Issue Number Two.

The second issue raised by Petitioners is: "This case presents the important question of whether the Fifteenth Amendment prohibits practices which deny or abridge the right to vote of minority persons even if those practices are not shown intentionally discriminatory."

This issue was not raised by Petitioners in either the District Court or in the Court of Appeals. They did allege a Fifteenth Amendment violation but this is the first time they have contended that a showing of intent is not required to show a violation of the Amendment. Justice Kennedy in his concurring opinion at 600 F.2d 1275 made note of this when he stated: "The plaintiffs originally brought this suit alleging violation of both the Fourteenth and Fifteenth Amendments, but on appeal they do not argue in the briefs that Fifteenth Amendment standards differ from Fourteenth Amendment standards."

As this issue was not raised before, it is not properly before the Court. U.S. Supreme Court Rule 19, 28 U.S.C.A.

However, even if this issue were before the Court the law is clear that the standard relative to a showing of intent are the same for the Fifteenth Amendment as they are for the Fourteenth Amendment.

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a landmark Fifteenth Amendment case, it was clear that an act that redefined the boundaries of the City of Tuskegee, Alabama was done with the specific intent to exclude Negro citizens from that city so as to deprive them of their preexisting vote. The act would have changed the shape of the

City of Tuskegee from a square to a strangely irregular twenty eight sided figure and would have removed all but four or five of the city's four hundred Negroe voters from the city while not removing a single white voter or resident.

It is clear from the case that intent is necessary in order to sustain a Fifteenth Amendment violation.

The case of *Wright v. Rockefeller*, 376 U.S. 52 (1964) also clearly illustrates that intent to discriminate is a necessary ingredient of a Fifteenth Amendment violation. Like the present case, the Court was faced with an allegation of voting rights violation on racial grounds. The action was predicated on the equal protection clauses and due process clauses of the Fourteenth and the Fifteenth Amendment. Like Justice Frankfurter in *Gomillion*, Justice Black also discussed the necessity of intent, at page 55,

> "We accept the findings of the majority of the District Court that Appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."

Justice Black continued at page 57,

> "We accept the District Court's finding that appellants have not shown that the challenged part of the New York Act was the product of state contrivance to segregate on the basis of race or place of orgin. That finding was crucial to Appellants' case . . ."

Finally in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978) p. 220, the circuit from which Petitioners cite most of their authority, the court unequivocally confirmed that intent to discriminate is a necessary component to sustain a Fifteenth Amendment violation. The Court stated:

> Thus, we must determine whether elicit motivation is a prerequisite to a successful claim under the Fifteenth Amendment. We hold that it is

. . .

> Broad though the reach of the amendment may be, it has been invoked successfully only in cases founded on acts of intentional discrimination.

Summation on Issue Number One.

The District Court Judge and three Court of Appeal Judges reviewed the entire voluminous record in this case and found that Petitioners failed to raise a genuine issue of material fact indicating they have been denied access to the political process or that the at large system utilized in the City of San Fernando for the selection of members to the City Council was conceived, instituted, operated, and continued as a purposeful devise to further racial or economic discrimination against them.

Unlike the cases from the Fifth Circuit there was no history in San Fernando, California, of past, protracted, systematic, or continued discrimination. Nor was there a history of *de jure* discrimination such as segregated schools. Also, like the Fifth Circuit cases there is and was no impediments to the political and electoral process itself, such as qualification tests to vote, poll taxes, party primaries and/or candidate slating procedures controlled by the white majority political parties; also there has been no prohibition against "single shot voting" and there is no majority vote requirement.

Because of the foregoing Mexican Americans in San Fernando have participated in the electoral and political processes of the city. They have registered to vote, they have voted, been slated as candidates for public office, campaigned for the candidate of their choice and politically organized. On this, the record is clear and Petitioners readily so admit.

The fact they have not been successful in electing Mexican American candidates in proportion to their population in the City is insufficient to establish a case of invidious discrimination, absent a showing that they have been denied access to the political processes or that the at large system was conceived and continued with the intent to discriminate against Mexican Americans.

The two lower Courts reviewed the voluminous record in this case in light of the existing law and in light of past and present reality in the City of San Fernando, California, both political and otherwise and found there was no impermissible dilution.

Summation on Issue Number Two.

This is the first time Petitioners have argued that intent is not necessary to establish a Fifteenth Amendment violation. The issue is not properly before the Court.

However, even if it were properly before this Court, the case law is clear that intent must be established in order to find a Fifteenth Amendment violation.

Conclusion.

For the reasons set forth herein the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEWIS, VARNI AND GHIRARDELLI,

Attorneys for Respondents.